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No.....

In The

# Supreme Court of the United States

OCTOBER TERM, 1948

DAVID BLACKWELL,
*Petitioner.*

vs.

STATE OF NEVADA,
*Respondent.*

No. 356 MISC.

# RESPONDENT'S OBJECTIONS AND BRIEF

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# SUBJECT INDEX

## CASES AND STATUTES CITED

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## OBJECTIONS AND BRIEF OF RESPONDENT

OBJECTIONS BY RESPONDENT TO THE PETITION

1. It appears from the petition and the record that the decision of the Supreme Court of Nevada rests upon adequate, independent, nonfederal grounds.

McCoy v. Shaw, 277 U. S. 302; Williams v. Kiser, 323 U. S. 471.

2. It appears that no Federal question was expressly or necessarily decided by said decision.

Whitney v. People, 274 U. S. 357.

3. The said decision that petitioner was convicted and sentenced in accordance with the procedure provided under the Constitution and laws of Nevada is not open to inquiry here.

Barrington v. Missouri, 205 U. S. 483.

4. The said decision is not expressly or by implication at variance with any applicable decision of this Court.

Judicial Code 28 U. S. C. 1257(3) Rules of Supreme Court, Rule 28 (5)a; Adamson v. California, 332 U. S. 46; Bute v. Illinois, 333 U. S. 640-658.

# BRIEF OF RESPONDENT

## History of Proceedings

On November 7, 1947, after 6 o'clock p. m., petitioner committed robbery with firearms at a tavern in the City of Reno, Washoe County, Nevada. After 10 o'clock the same night he shot and killed Captain LeRoy Geach of the Reno police who had entered his room in a Reno hotel while acting on a report of the robbery. The killing was done with an automatic pistol which petitioner concealed in the covers of a bed on which he was lying.

On December 17, 1947, an information was filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, charging petitioner with murder in that he did at the time and place stated kill LeRoy Geach "willfully, unlawfully and feloniously and with malice aforethought."

Hon. Wm. McKnight, Judge of said District Court, had called District Judge Taylor H. Wines to sit for him pursuant to section 8469 N. C. L. 1929, and Rule 41 District Court Rules and on December 22, 1947, petitioner pleaded guilty to the offense charged in the information, which plea Judge Wines received, accepted and noted.

On December 26, 1947, Judge Wines, after declaring that he felt himself disqualified to proceed, assigned the further conduct of the proceedings to Hon. Merwyn H. Brown, another District Judge.

On December 24, 1947, the Supreme Court of Nevada declined to issue a writ of mandate directed to Judge Wines in the premises and on December 30, 1947, declined to issue a writ of prohibition directed to Judge Brown in the premises.

On January 7, 1948, District Judge Merwyn H. Brown, presiding, adjudged petitioner to be guilty of murder in the first degree and fixed his punishment at death. This was after a hearing and the taking of evidence January 5, 6, and 7, 1948.

The judgment was affirmed by the Supreme Court of the State of Nevada (R. 188-207). Rehearing was denied (R. 261-263).

## Questions Presented

In the petition on page 8 of the combined petition and brief counsel present two questions, viz:

1. Does the Fourteenth Amendment to the Federal Constitution prohibit a State from putting a person in second jeopardy?

2. Does the Fourteenth Amendment to the Federal Constitution prohibit a State from depriving a person of life and liberty without due process of law by permitting the admission of prejudicial evidence of other purported crimes unrelated to the crime in issue, after a plea of guilty to murder, to determine the degree of the crime and fix the penalty therefor and prior to the determination of the degree?

In the brief on page 12 of the combined petition and brief counsel specify as error:

I. The Supreme Court of the State of Nevada erred in holding that petitioner had not been twice in jeopardy for the same offense in violation of the due process clause of the Constitution of the United States.

II. The Supreme Court of the State of Nevada erred in holding that prejudicial evidence of other purported and unrelated crimes is admissible prior to determining the degree of murder after a plea of "guilty to murder" under chapter 91, Statutes of Nevada 1947, and that such was not a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Thus counsel presents the two questions in differing terms and if the variance be disregarded, each question is either not broad enough or too broad.

The first question may be answered in the affirmative if second jeopardy involves a denial of due process.

The second question may be answered in the affirmative if

the admission of "prejudicial evidence" amounts to a denial of due process.

Likewise, in the errors specified on page 12 of brief, counsel assume: I, petitioner was in fact twice placed in jeopardy and thus a denial of due process is demonstrated.

In II, counsel assume that prejudicial evidence was in fact received and thus a denial of due process is demonstrated.

The Fourteenth Article of Amendments to the Constitution of the United States does not mention double jeopardy nor prejudicial evidence. It is not definitive.

The Constitution of Nevada obeys it, but is no more definitive as to what the phrase "due process" means (Sec. 8, Art. I, Const. Nevada). It substantially adopts the language of Article V of Amendments to the Constitution of the United States and in both provisions the mention of double jeopardy in the same sentence is not mere repetition.

## Petitioner's Argument

The petitioner's argument does not show by the record what Federal questions were expressly presented on appeal to the Supreme Court of Nevada. The Court's decision, however, shows what errors were assigned on appeal. First assignment (R. 191, lines 11-18) referring to Article I, sec. 8, Constitution of Nevada. Second assignment (R. 198 lines 1-10) referring to section 1 of Article XIV, Constitution of the United States, in conjunction with Article I, sec. 8, Constitution of Nevada. The Fifth Amendment to the Constitution of the United States is also referred to. Third assignment (R. 206 lines 14-20), denial of an early trial, citing section 10654 N. C. L. 1929, not assigned here.

These assignments were carefully examined by the Supreme Court of Nevada and found not well founded as a matter of ultimate fact or law. The Court did not find it necessary to construe any State or Federal constitutional provision, but solved the issues on appeal on entirely nonfederal grounds. The pro-

cedural and substantive laws of Nevada were examined and no error was found in their application or construction in the trial court. Such a conclusion carries considerable persuasive force, to speak mildly, in courts of the United States. (See Judicial Code 28 U. S. C. 1652 displacing 28 U. S. C. 725; R. S. 721.) See United States v. Ragen, Warden 170 F(2) 189.

> The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is *an alert deference to the judgment of the state court under review*. (Emphasis supplied.)

Justice Frankfurter concurring in Adamson v. California, 332 U. S. 46 at 68 (R. 259 lines 11-17).

In the decision on appeal to the Supreme Court of Nevada on the first assignment (that the accused was subjected to jeopardy twice) the Court said:

> Upon the foregoing considerations, we are unable to find sufficient force in the analogy urged by defendant to justify the finding of a second jeopardy. We are brought to the conclusion that *there was one, and only one, jeopardy* incurred by the defendant in the present case, and that *such jeopardy arose upon the hearing before Judge Brown when the introduction of proofs on the part of the State was commenced*. (R. 197 lines 1-7). (Emphasis supplied.)

On the second assignment the Court decided:

> The admissible evidence received in the present case and not controverted in any way by defendant, amply

> justified the judgment of murder of the first degree and the death penalty. We are satisfied that the admission of the evidence of prior offenses was not prejudicial to any right of the defendant. (R. 206 lines 8-13.)

The third assignment is not renewed here. It was found to be without merit (R. 207 line 1).

A fourth assignment was likewise rejected (R. 207 line 19).

The Court found "no error in the record" (R. 207 line 20).

Petitioner's argument in support of point I—see combined petition and briefs, pages 14, 15, 16 to line 26.

Petitioner's argument in support of point II—see combined petition and brief, page 16, lines 27-30, pages 17, 18, line 1 to 11.

Petitioner's argument on the foregoing points, with the authorities, was presented to the Supreme Court of Nevada. This is evident from the list of authorities, constitutions, texts, statutes and rules of Court indexed ante page 1 of combined petition and brief; from the index, petition for rehearing before the Supreme Court of Nevada, and table of authorities (R. 208-215). It appears from the body of the petition for rehearing (R. 217-260 embracing authorities).

The opening brief on appeal and assignment of points and authorities is not in the record, but it is enough to say that no argument, authority, text, constitutional or statutory provision or rule of Court in the petition for certiorari and brief in support thereof now before this Court (other than relating to certiorari) was lacking in the presentation before the Nevada Supreme Court.

Inasmuch as the Nevada Supreme Court was not persuaded from the record on appeal or counsel's application of it to the law relied on, respondent does not feel in duty bound to relitigate the matter disposed of so finally by the Nevada Court, and disposed of on nonfederal grounds.

But one obscure point calls for discussion and that is as to how definitive is the established norm of "due process."

Broadly speaking, due process is what the lawgivers declare it to be. It reflects the *mores* of each generation. It is a concept of law woven mainly out of history. (See "The Nature of the Judicial Process," Cardozo, Chapter on History, Tradition and Sociology, Yale University Press, 1922.)

In Adamson v. California, 332 U. S. 46, the State of California was absolved from the charge of disobeying the Fourteenth Amendment by withholding due process in a case which might at first blush appear to be an aggravated wrong. Yet this court kept hands off. Mr. Justice Black wrote a dissenting opinion.

Divergent views as to the elements constituting due process are to be met in the following authorities:

Snyder v. Massachusetts, 291 U. S. 105 (Cordozo, J.); Kepner v. United States, 195 U. S. 100 (Dissent by Holmes, J.); Palko v. Connecticut, 302 U. S. 319; Twining v. New Jersey, 211 U. S. 78; State v. Brunn, 154 P(2) 826.

A convenient exposition of the law drawing largely upon the decisions of this Court is—State v. Brunn (Wash.) 154 P(2) 826.

The Supreme Court of Washington reversed an order dismissing a prosecution on a criminal charge at the close of the State's case, thus validating a statutory procedure that had been thought to involve subjecting the accused to a second ordeal and jeopardy.

The opinion goes on to point out that we did not receive a certain and unfluctuating heritage from the common law of England that we crystalized in the Fifth Amendment in the Bill of Rights. No such heritage overshadows logically the Fourteenth Amendment when it is applied as a touchstone to identify due process. The dissent of Justice Holmes in the Kepner case (particularly bearing on his theory that a criminal prosecution was a continuing proceeding until both law and facts had been ironed out at the behest of either side, save only when terminated

by acquittal at the hands of a jury) is cited as well as the more violent innovation in Palko v. Connecticut, 302 U. S. 319, whereby statute a reciprocal right of appeal and new trial is accorded the State even after a *jury verdict*. Toward the close of the opinion the Court said:

> We think, therefore, that the first part of defendant's proposition, as we have formulated it, namely, that when the Fifth Amendment was adopted there was a definitive rule of the common law which determined when a jury might properly be discharged, is not maintainable. Of course it follows that, if there was no such definitive rule, but only a judicial practice, necessarily and actually fluctuating, it is not admissible to assume that this fluctuating rule of practice was, in contemplation of the Constitution, a fixed and positive rule. And as the proposition that an improper discharge of the jury is, in the sense of the Constitution, a trial and acquittal, and for that reason a bar to further jeopardy, depends absolutely upon the existence of a fixed rule for determining when a discharge is improper, that proposition also must fall.

See 154 P(2) 826 at 838. I Bishop Cr. Law (9th Ed.) Sec. 979, 982, pages 727, 728.

We may say here as to the heritage of the common law in Nevada that section 532 of the Civil Practice Act (sec. 9021 N. C. L. 1929) makes the common law of England, so far as it is not repugnant to, or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, "the rule of decision in all courts of this state."

In Reno S. M. & R. Works v. Stevenson, 20 Nev. 269, 276; 21 P. 317, it was held that the common law doctrine of riparian rights is unsuited to the condition of this State and therefore does not prevail against the doctrine of appropriation.

The foregoing observations, commenting on Adamson v. California and following, are suggested by the claim of petitioner that

when Judge Wines received his plea of guilty petitioner entered upon jeopardy and that when Judge Brown began inquiring into the degree of the offense petitioner was plunged into a second jeopardy. Petitioner contends the interruption was inadmissible; was tantamount to a mistrial and acquittal and frustrated the entire proceeding beyond repair. Respondent contended that even if Judge Wines were not disqualified in fact under the common law and no express disqualification arose by State law, section 8407 N. C. L. 1929, by abdicating his functions Judge Wines created an imperative necessity to supply a vacancy. Respondent also contended that aside from the obscure question of disqualification there was a clear statutory and court rule authority to call in Judge Brown to perform the work of the Court.

Judge Hatton, sitting on the Supreme Court bench, ruled that as a matter of history and law petitioner did not enter the danger zone until, before Judge Brown, the inquiry began and evidence was adduced on the degree of guilt and the fitting penalty (R. 192 lines 27-30). Judge Hatton further ruled that the calling in of Judge Brown was proper under the District Court Rule No. 41 (see Rules of District Court ante, sec. 8500 N. C. L. 1929), and no inquiry or showing as to the reason for so doing was necessary.

In Snyder v. Massachusetts (1934), 291 U. S. 97, Mr. Justice Cardozo said (page 105):

> The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing cases). Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. * * *

In closing the opinion Justce Cardozo said (page 122):

> The constitution and statutes of judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. * * * There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

The instant case presents a condition and not a theory and it is not to be solved by a mere application of a "tyranny of labels." The local law has been construed and its application approved by the Supreme Court of the State of Nevada and this Court will accept that construction.

United States ex rel. Holderfield v. Ragen, Warden (CCA 7th), 170 F(2) 189.

See prior history—People v. Holderfield, 393 Ill. 138, Certiorari denied. 328 U. S. 862.

Cases somewhat similar to the instant case, originating in the State of Nevada, are the following:

Kramer v. Sheehy, Warden 316 U. S. 646, Petition for appeal dismissed; Ex p. Skaug, 328 U. S. 841, certiorari denied; McKay v. Nevada et al, 329 U. S. 749, certiorari denied.

The power of the people of Nevada to enact the pertinent statutes is not drawn into question here.

The Supreme Court of Nevada did not find it necessary to

inquire whether under section 8407 N. C. L. 1929 Judge Wines was disqualified to act or to declare himself to be disqualified to act.

The Court did find that under Rule 41 of the District Court Judge Wines properly called Judge Brown to act in the case.

A rule of Court has the force of statute.

Sullivan v. Nevada Industrial Commission, 54 Nev. 301 at 307, 11 P(2) 262.

The Supreme Court of Nevada construed and approved the application of section 10068 N. C. L. 1929 as amended by chapter 91, Statutes of 1947, page 302. This statute as affected by chapter 260, Statutes of 1947, page 828, was controlling. (Chapter 260, Statutes of 1947, forbids the imposition of the death penalty if the accused was under the age of 16 years at the time of the commission of the crime. It is not pertinent here except that inferentially it is to be considered in choosing between a sentence of death and one of life imprisonment.)

Section 10068 N. C. L. 1929, as amended, classifies murder into two degrees. Murder in the first degree includes all willful, deliberate and premeditated killing. Malice is implied "when no considerable provocation appears or where all the circumstances of the killing show an abandoned and malignant heart." All other kinds of murder are murder in the second degree. Lack of premeditation usually characterizes murder in the second degree. (Cf. State v. Randolph, 49 Nev. 241.)

Upon a plea of guilty, the statute proceeds to say, the Court shall determine the same. Murder in the first degree is punishable by either death or life imprisonment.

The Supreme Court of Nevada in construing this statute and approving its application found:

(1) That the determination would involve the taking of testimony by the Court without a jury.

(2) That the determination began with the taking of testi-

mony and not with the entry of the plea of guilty before Judge Wines.

(3) That the evidence received did not prejudice defendant in any substantial right or at all.

(4) That there was no error in the proceedings either as laid or at all.

It may be observed that the inquiry should disclose:

(1) Whether defendant was under the age of 16 when the offense was committed.

(2) Whether the circumstances showed *an abandoned and malignant heart*, thus raising the implication of malice.

(3) Whether, the killing being admitted under the plea of guilty the offense should be deemed murder in the first or in the second degree.

(4) Whether, the crime being classed as murder in the first degree, the punishment should be death or imprisonment for life.

## CONCLUSION

Entirely aside from the objection that the specification of repugnance to prohibitions in the Federal and State constitutions was directed to the State Constitution alone (although embracing the same principle), respondent contends that the record here discloses no absence of a fair trial and the petition ought to be denied.

Respondent is well aware of the historical basis of the Fourteenth Amendment involving the protection of civil rights to newly adopted recipients of freedom among circumstances, some persisting, of race animosity. This Court cannot well escape responsibility for the administration of justice to all citizens merely because local laws have been upheld in localities. But respondent contends this case does not present so difficult a choice. There are no circumstances of oppression, discrimination, or rebellion against the spirit of the Fourteenth Amendment. Nothing cries to justice to set this guilty man free. Here "there is no seismic

innovation. The edifice of justice stands, its symmetry, to many, greater than before."

Respectfully submitted,

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Due service of and receipt of a copy of the foregoing brief are accepted this.....day of February, 1949.

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